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No. 80-106

# In the Supreme Court of the United States

OCTOBER TERM, 1979

SAICI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the entry of a default judgment against it in this suit by the United States against Leone and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, to recover estate taxes allegedly due upon the Estate of Adriana Bosurgi.

The pertinent facts may be summarized as follows: Adriana Bosurgi died on March 27, 1963. At the time of her death, she owned a custodial account with the Chemical Bank of New York containing securities worth more than $1 million. The securities were then transferred to her two sons, Leone and Emilio, who also entered into a custodial account agreement with the Chemical Bank. In 1966, the Bosurgis brought an action in a state court

against the bank for mismanagement of their account. That action was settled with the bank's promise to pay $215,000 to them. On March 2, 1971, the Internal Revenue Service made three assessments against the Bosurgi brothers for estate taxes due from their mother's estate. On the same day, it brought the present action in the United States District Court for the Southern District of New York to foreclose the resulting tax liens on the $215,000 fund derived from the Bosurgi-Chemical Bank settlement. The district court assumed custody of the $215,000 fund (A. 4-5).[1]

On June 2, 1971, petitioner SAICI[2] brought an action in a state court against the Bosurgis, claiming ownership of the settlement fund by virtue of a financing agreement entered into on December 10, 1954, between petitioner, Mrs. Bosurgi, and the Bosurgi brothers. Petitioner filed a motion for summary judgment, which was not opposed by the Bosurgis; indeed, they conceded the existence of the December 10th agreement. Although the trial court initially denied the motion because the federal court had jurisdiction over the res, the Appellate Division of the New York Supreme Court reversed, granting petitioner's motion for summary judgment. In so doing, the court stated that the federal government's tax lien on the fund would not be affected (A. 5-6).

Meanwhile, in the federal court action, petitioner, which the government had joined as a defendant, moved for summary judgment, based upon the state court's determination that it owned the fund in question. The

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[1]"A." refers to the district court's opinion reproduced in the joint appendix filed in the court of appeals.

[2]SAICI is the acronym for Sociedad Anonima de Inversiones Commerciales e Industriales.

district court granted petitioner's motion, but the court of appeals reversed. *United States* v. *Bosurgi,* 530 F. 2d 1105 (2d Cir. 1976). The court expressly ruled that because the state court did not control the fund, its judgment was not binding on the federal court which had assumed custody of the fund. At all events, the court of appeals held that the state court judgment did not control the federal action because petitioner's motion for summary judgment was unopposed, and the state court did not have before it the conflicting evidence submitted in the federal suit by the government, which was not a party in the state court proceeding (530 F. 2d at 1112).

On remand, petitioner resisted all attempts at discovery. After initially failing to respond to the government's written interrogatories and requests for documents, petitioner ultimately submitted answers that were incomplete. At a hearing held by the magistrate, petitioner was directed to answer "fully and completely." When petitioner failed to comply, the magistrate, after a second hearing, found that petitioner's answers to the interrogatories were evasive, incomplete, and unresponsive; that the requested documents had not been produced; and that petitioner's failure to respond properly had been willful. Accordingly, the magistrate ruled that petitioner could not offer into evidence any of the documents underlying its claim of ownership of the fund (A. 8-9).

The government also filed and served a notice to take petitioner's deposition. Petitioner then sought an order directing that an immediate trial be had to determine the binding force of the judgment obtained in the state court and for a stay of all pretrial proceedings pending such a determination. The district court denied petitioner's motion, and instead ordered petitioner to appear and testify at a properly noticed deposition. The government

served a new notice to take petitioner's deposition, and petitioner again failed to produce a representative for the taking of its deposition. Subsequently, in a conference with the district judge, petitioner reiterated its position that the state court judgment against the Bosurgis was binding on the United States and foreclosed all discovery. As a result, the court struck petitioner's answer and entered judgment for the United States (A. 9-11). The court of appeals affirmed (Pet. App. 1a-2a).

1. The decision below correctly upheld the default judgment entered against petitioner. The standard for determining whether a default judgment was properly entered for refusals to comply with court orders directing discovery is whether the district court abused its discretion. *E.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976); *Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F. 2d 442, 447 (2d Cir. 1967). It is well settled that a district court may impose the sanction of a default judgment when a party willfully refuses to comply with an order to respond to requests for discovery (see, *e.g., Al Barnett & Son* v. *Outboard Marine Corp.*, 611 F. 2d 32, 35 (3d Cir. 1979); *Paine, Webber, Jackson & Curtis, Inc.* v. *Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F. 2d 3, 6 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977)). Since petitioner willfully refused to comply with two of the district court's orders directing it to respond to the government's requests for discovery, the district court did not abuse its discretion in entering default judgment (cf. *Emerick* v. *Fenick Industries, Inc.*, 539 F. 2d 1379, 1381 (5th Cir. 1976)).

Petitioner suggests (Pet. 18-20) that a default judgment was inappropriate because it was unable to provide all the requested information. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 213 (1958). But it is impossible to

assess the accuracy of petitioner's assertion because it has provided virtually no information about itself. At the very least, petitioner could have produced a representative for the noticed deposition who had first-hand knowledge of its operation.

Petitioner's basic position (Pet. 13-14, 16-17, 22), however, is that there was no question of fact to be discovered, because its right to the settlement fund was "invulnerable" by reason of the state court judgment. Petitioner argues (Pet. 20-21) that by refusing to give full faith and credit to that state court judgment, the decision below is in conflict with this Court's decision in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967). In *Bosch, supra,* this Court held that where federal courts are faced with determining federal estate tax consequences in cases that turn on state law, they must, in the absence of a decision by the highest court of the state, "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State" (387 U.S. at 465).

But as the court of appeals correctly held, "even if due regard is accorded to the state court's adjudication, * * * it would be only as valid as its evidentiary base."[3] Here, it went on to hold, there were sound reasons for not adhering to the state court's decision. First, since petitioner's motion for summary judgment in the state court action was unopposed, the federal district court was amply justified in disregarding such a judgment for purposes of determining federal tax liability where the factual questions involved were not contested in the state

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[3]The court of appeals questioned at the outset whether a determination under *Bosch* was necessary because the federal court, and not the state court, had first assumed jurisdiction over the $215,000 fund in question. *United States* v. *Bosurgi, supra,* 530 F. 2d at 1112.

court. *Estate of Smith* v. *Commissioner,* 510 F. 2d 479 (2d Cir.), cert. denied, 423 U.S. 827 (1975); cf. *Aerojet-General Corp.* v. *Askew,* 511 F. 2d 710, 720 (5th Cir. 1975). Second, since the state court based its decision on an attorney's hearsay affidavit regarding the authenticity of the Bosurgi-SAICI correspondence, it did not have before it the conflicting evidence submitted in the federal suit by the government, which was not a party to the state court proceeding. Thus, the state court's decision was given "proper regard," but still found not to be controlling in light of the factual circumstances of the state court litigation.

2. Nor is the government foreclosed from asserting the Bosurgis' ownership of the fund by the doctrine of non-mutual collateral estoppel, as petitioner asserts (Pet. 23-25). Whether the doctrine is used offensively or defensively, it may apply where the party against whom estoppel is asserted has litigated and lost in an earlier action. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979). However, the doctrine does not apply here where the party against whom estoppel is asserted, *i.e.,* the United States, was not a party to the earlier state court action and has not litigated or lost anything.

Petitioner asserts further (Pet. 10, 24) that the government was informed of the state court proceedings, that it was invited to file an amicus brief in those proceedings, and that it applied a "laboring oar." Since the state court proceeding involved only an unopposed motion for summary judgment, it is difficult to see where any "laboring oar" was applied. This is not a case where the United States, although a nonparty, assumed control over litigation in which it had a direct financial interest. The principles of collateral estoppel therefore do not apply. Cf. *Montana* v. *United States,* 440 U.S. 147, 153-155 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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